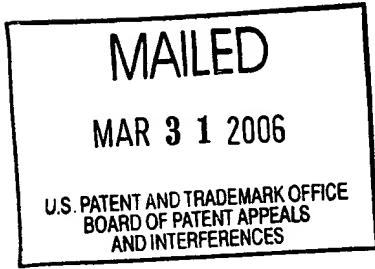


The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES



Ex parte KIRIL A. PANDELISEV

Appeal No. 2005-2644
Application No. 09/587,318

ON BRIEF

Before McQUADE, CRAWFORD, and BAHR, Administrative Patent Judges.
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's rejection of claims 1-41, 84, 85 and 87-105. Claims 42-83 stand withdrawn from consideration under 37 CFR § 1.142(b). No other claims are pending in this application.

We AFFIRM-IN-PART and REMAND.

BACKGROUND

The appellant's invention relates to a flexible and portable unit employing individually powered and controlled cells that produce a radio frequency, electromagnetic radiation, magnetic field or a current-voltage signal for healing purposes (appellant's specification, page 1). The cells may have self-contained controls or be remote controlled. A copy of the claims under appeal is set forth in the appendix to the appellant's brief.

The Applied Prior Art

The prior art references of record relied upon by the examiner in rejecting the appealed claims are:

Browner	3,025,857	Mar. 20, 1962
Russek	4,381,012	Apr. 26, 1983
Ostrow et al. (Ostrow)	5,344,384	Sep. 6, 1994
McLeod et al. (McLeod)	5,518,496	May 21, 1996

The Rejections

The following rejections are before us for review:

- (1) Claims 1-4, 26, 39, 84 and 87-105 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Ostrow.

- (2) Claims 5, 6, 34, 36 and 85 stand rejected under 35 U.S.C. § 102(b) as being anticipated by or, in the alternative, under 35 U.S.C. § 103 as being unpatentable over Ostrow.
- (3) Claims 7-15, 38 and 40 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ostrow in view of McLeod.
- (4) Claims 16, 22-25, 27-34 and 36 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ostrow in view of Russek.
- (5) Claims 17-21 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ostrow in view of Russek and McLeod.
- (6) Claims 35, 37 and 41 stand rejected under 35 U.S.C. § 103 as being unpatentable over Ostrow, Ostrow in view of Russek or Ostrow in view of McLeod, respectively.
- (7) Claims 1-3, 26, 32, 84, 87 and 89-105 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Browner.
- (8) Claims 1-6, 16, 22-25, 27-34, 36, 38, 39, 84 and 87-105 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Russek.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (mailed February 9, 2005) for the examiner's complete reasoning in support of the

rejections, and to the brief (filed December 8, 2004) and reply brief (filed March 9, 2005) for the appellant's arguments thereagainst.

OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Rejection (1)

With respect to claim 1, appellant argues that Ostrow does not teach healing and does not teach a body-contacting base with plural cells (brief, page 16). Neither of these arguments has any merit whatsoever. First, Ostrow quite clearly and expressly discloses a magnetotherapy apparatus for use in stimulating growth and repair of living tissues. Second, Ostrow's applicator wrap 22, several of which are illustrated in Figure 1 wrapped around body parts, is described by Ostrow as being fabricated from a thermoplastic material and preferably molded with a grid-like pattern having linked panels 28 connected by integral flexible hinges 30. Each of the panels 28 is provided with an electromagnetic treatment coil 42.

Appellant also argues, with respect to claim 1, that Ostrow shows no controls connected to the cells separately controlling application of power to each of the cells independently (brief, page 16). On the contrary, Ostrow discloses, in column 4, lines 43-50, that

[w]ith regard to the electromagnetic field therapy, a computerized chip distribution system monitors and supplies the strongest current directly to coils 42 positioned over the target area according to a treatment protocol. A weaker current will be supplied to the secondary anatomical structure surrounding the target area. This is an optional feature which is built into the console 24.

It is apparent from the above disclosure that Ostrow's console 24 includes controls connected in some fashion to the cells and to the generator 48 which separately control application of power, in the form of current, to each of the coils 42 individually, so as to achieve the described current distribution with respect to the target area.

In short, none of appellant's arguments is at all persuasive as to any error on the part of the examiner in rejecting claim 1 as being anticipated by Ostrow. Accordingly, the rejection of claim 1 as being anticipated by Ostrow is sustained. We shall also sustain the rejection of dependent claims 3, 4, 26 and 39 as being anticipated by Ostrow since the appellant has not challenged such with any reasonable specificity (see In re Nielson, 816 F.2d 1567, 1572, 2USPQ2d 1525, 1528 (Fed. Cir. 1987)). As pointed out in 37 CFR § 41.37(c)(1)(vii), "[a] statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim."

With respect to claim 2, Ostrow's applicator wrap is thin, flexible, as evidenced by the illustration of several such wraps 22 as wrapped around various body parts in Figure 1, and portable, as called for in the claim. It follows that the rejection of claim 2 is thus also sustained.

We shall not sustain the rejection of claim 84 as being anticipated by Ostrow. Claim 84 requires that the cells "concurrently or sequentially generate radio frequencies, electromagnetic radiations, magnetic fields, current-voltage signals, and combinations thereof" (emphasis added). In other words, claim 84 calls for the cells to generate all of the recited forms of energy, either concurrently or sequentially, as well as combinations thereof. While Ostrow discloses cells (panels) generating electromagnetic energy and magnetic fields, via the coils 42, and current-voltage signals, via the stimulator pads 64, 65, the examiner has not pointed to any disclosure in Ostrow of generation of radio frequencies, as also required in the claim.

With respect to claim 87, appellant argues, in addition to the arguments directed to the rejection of claim 1, that Ostrow does not show controls connected between an energy generator and the cells for controlling energy applied to the wounded tissues by the cells. The above-quoted disclosure of Ostrow in column 4, lines 43-50, provides full response to this limitation. While the specific structure of the controls is not detailed by Ostrow, they control the level of current supplied from the generator 48 to each of the coils 42 and thus must be connected between the energy generator and the coils. The

rejection of claim 87, as well as dependent claims 90-101 which appellant has not separately challenged with any reasonable specificity, is sustained.

With respect to claim 88, Ostrow discloses an electrochemical cell, such as a nickel cadmium battery, and two independent pulse generators 48, 50 for electromagnetic field therapy and electrostimulation, respectively. The rejection of claim 88 is sustained.

With respect to claim 89, Ostrow teaches applying controlled field intensities in column 4, lines 43-50. The rejection of claim 89 is sustained.

With respect to claim 102, appellant argues that Ostrow shows no controls connected to the cells separately controlling application of power to each of the cells (brief, page 25). This argument is unsound for two reasons. First, it is not commensurate with the scope of claim 102, which does not require separate control of application of power to each of the cells. It is well established that limitations not appearing in the claims cannot be relied upon for patentability. In re Self, 671 F.2d 1344, 1348, 213 USPQ 1, 5 (CCPA 1982). Second, in any event, this control feature is disclosed by Ostrow, as discussed above. The rejection of claim 102, as well as dependent claims 103-105 which appellant has not separately argued with any reasonable specificity, as being anticipated by Ostrow, is sustained.

Rejection (2)

Claim 5 depends from claim 4 and further recites that the power source is mounted on the base. Claim 6 also depends from claim 4 and further recites that the power supply is connected to the base. Ostrow discloses a battery housed within the console 24, which is illustrated in Figure 1 as being mounted¹ to the applicator wrap 22 wrapped around the patient's midsection, with the console, and hence the battery and pulse generators, being connected to the base by a cable harness 26. Accordingly, the rejection of claims 5 and 6 as being anticipated by or, in the alternative, as unpatentable over Ostrow is sustained.

Claims 34 and 36 depend from claim 1 and further recite that the power supply is either a battery or a signal generator and control mounted on one end of the base. As noted above, Ostrow discloses a battery and pulse generator and control housed in the console 24, which is connected by a cable harness 26 to the top end of the applicator wrap 22 wrapped around the patient's midsection. Moreover, to mount the console to one end of the applicator wrap, rather than in the middle thereof, would have been obvious to one of ordinary skill in the art so as to prevent the console from interfering with the wrapping of the applicator wrap. The rejection of claims 34 and 36 as being anticipated by or, in the alternative, as unpatentable over Ostrow is sustained.

¹ Although the details of such mounting are not shown, the console is illustrated as at least being connected to the applicator wrap 22 by cable harness 26, which, in and of itself, is a mounting.

With respect to claim 85, none of appellant's arguments on pages 52-53 of the brief is well taken. As discussed above, Ostrow discloses use of the applicator wrap for therapeutic body treatment or therapy. Ostrow further discusses "curative regimens" (column 2, lines 27-28). Any contention that Ostrow does not teach a method for healing or speeding healing of tissues is simply unsound. Additionally, Ostrow discloses varying of current strength (column 4, lines 43-50) supplied to the coils and modulation of the pulse from pulse generator 50 to achieve the desired electrostimulation therapy (column 5, lines 27-36). The rejection of claim 85 as being anticipated by or, in the alternative, as unpatentable over Ostrow is sustained.

Rejection (3)

We shall not sustain the rejection of claims 7-15 as being unpatentable over Ostrow in view of McLeod. Simply, stated, given the substantial structural dissimilarity, including the differences in scale, between the panels 28 of Ostrow and the treatment pads 130, 132 of McLeod, we find no reasonable teaching or suggestion in McLeod to move the controls from within the console 24 of Ostrow to within each panel, as called for in the claims.

We shall, however, sustain the rejection of claims 38 and 40 as being unpatentable over Ostrow in view of McLeod. With respect to claim 38, Ostrow clearly teaches that the current, i.e., field strength of the electromagnetic energy (column 4,

lines 43-50), and the frequency (column 5, lines 28-36 and 62-64) can be varied. With respect to claim 40, appellant's argument on page 63 of the brief is not well taken, as it is grounded on a contention that neither of the applied references teaches or suggests sensors incorporated into the base and McLeod unquestionably discloses a magnetometer 146 incorporated into each treatment pad to determine the magnitude of the flux density of the local magnetic field and measure the magnitude of the applied field which may vary somewhat depending on the degree that the field coils are deformed to match the contour of the body region to which they are fitted (column 7, first paragraph). The benefits of such a feature in the applicator wrap 22 of Ostrow, to more closely control the application of electromagnetic energy, would have been readily apparent to one of ordinary skill in the art. Accordingly, the combination of Ostrow and McLeod would have fairly suggested the provision of such a feature in the panels of Ostrow's applicator wrap.

Rejections (4) and (5)

Claim 16 depends from claim 1 and further recites remote controls connected to the controls for controlling the cells remotely. Russek teaches, in a device, comprising a flexible fabric wrap, for placement of electrodes against the body for therapeutic purposes, that the provision of remote controls for controlling the application of energy to the individual electrodes, or energy-applying points, is particularly advantageous to

enable more convenient control by a patient who has limited movement and cannot reach behind his back, for example, to adjust the amplitude or turn the unit on or off (column 6, lines 38-50). This teaching would have provided ample motivation to one of ordinary skill in the art to provide remote controls connected to the controls in Ostrow's console 24 for controlling the energy supplied to the panels 28 remotely. The rejection of claim 16 as being unpatentable over Ostrow in view of Russek is sustained.

Inasmuch as appellant has not argued the rejection of claims 17-21 as being unpatentable over Ostrow in view of Russek and McLeod separately from claim 16 with any reasonable specificity², thereby allowing them to stand or fall with claim 16 from which they depend, this rejection is also sustained.

The rejection of claims 22-25 as being unpatentable over Ostrow in view of Russek is also sustained. Ostrow discloses each of the features urged by appellant to be lacking (see brief, page 66) in claims 22-24. In particular, Ostrow discloses cable harnesses 26 connected between the console 24 and wrap 22, electrodes (conductive stimulator pads 64, 65) applied to the contact surface 34 of the wrap 22 and patient insulation (electromagnetic radiation shielding substrate 38). As for claim 25, while it seems inconceivable that Ostrow's device would not be provided with some sort of on/off switch, Russek certainly evidences that on/off switches for energy-applying body

² As already noted, in accordance with 37 CFR § 41.37(c)(1)(vii), a statement which merely points out what a claim recites will not be considered an argument for separate patentability of that claim.

therapy devices were well known in the art at the time of appellant's invention and would have fairly suggested the use of such on Ostrow's device.

The rejection of claims 27-34 and 36 is also sustained, as appellant has not argued these claims with any reasonable specificity separately from claim 1 from which they depend, thereby allowing them to stand or fall with claim 1.³

Rejection (6)

We shall not sustain the rejection of claims 35, 37 and 41 as being unpatentable over Ostrow, Ostrow in view of Russek or Ostrow in view of McLeod. With respect to claims 35 and 37, the examiner has not pointed to any teaching or suggestion in Ostrow, Russek or McLeod to position the battery power supplies or signal generator and control of Ostrow as called for in the claims and has applied an inappropriate test in determining that this distinction between the claimed subject matter and the prior art would have been obvious. In particular, the test for obviousness is not whether the claimed feature provides an advantage, is used for a particular purpose or solves a stated problem (see answer, pages 17-18). Nor is it sufficient that one of ordinary skill in the art would have expected appellant's invention to perform equally well with the power supplies and signal generator and control mounted as taught by Ostrow or

³ As pointed out above, a statement which merely points out what a claim recites will not be considered an argument for separate patentability of the claim.

Ostrow in view of Russek (see answer, page 18). Rather, the test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art. See In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991) and In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). As explained in In re Kahn, Slip Op. 04-1616, page 9 (Fed. Cir. Mar. 22, 2006),

rejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. This requirement is as much rooted in the Administrative Procedure Act, which ensures due process and non-arbitrary decisionmaking, as it is in § 103 [citations omitted].

With respect to claim 41, while McLeod discloses a magnetometer in the treatment pad to determine the magnitude of the magnetic flux density of the local magnetic field, the examiner has not pointed to any teaching or suggestion in any of the applied references to provide sensors which measure different parameters indicative of the wounds to be treated.

Rejection (7)

With respect to claim 1, appellant argues, on page 27 of the brief, that Browner does not show controls connected to the cells separately controlling application of power to each of the cells individually. This argument is not well taken, in light of Browner's disclosure of adjusting knobs 31 and potentiometers 32, which control

current supply to each of the electrical contacts. Appellant also argues, on page 27 of the brief, that "Browner does not meet the functional use recitations presented in the claims." Aside from pointing out that claim 1 is directed to an apparatus comprising a base for placement on a body and wound treatment cells on the base, appellant does not elaborate as to why this is the case. Inasmuch as Browner discloses electrical contacts 1, 2, 4, 5, 7 and 10, for electrical therapy, mounted directly on fabric 12 and contacts 3, 6, 8, 9, also for electrical therapy, supported by elements 17 adapted to be extended up around contiguous portions of the body, Browner appears to meet the functional use recitations of claim 1. The rejection of claim 1, as well as claims 3, 26 and 32 which appellant has not separately argued with any reasonable specificity⁴, as being anticipated by Browner is sustained.

With respect to claim 2, Browner's fabric 12 is sufficiently thin and flexible to conform to the patient's body and elements 17, which comprise electroconductive sheets stitched to the fabric 12, are sufficiently thin and flexible to be extended around contiguous portions of the body and thus appear to meet the thin, flexible and portable limitations of claim 2. The rejection of claim 2 as being anticipated by Browner is sustained.

⁴ As previously noted, a statement merely pointing out the features recited in a claim will not be considered a separate argument for patentability of that claim.

The rejection of claim 84 as being anticipated by Browner is not sustained.

Claim 84 requires that the cells "concurrently or sequentially generate radio frequencies, electromagnetic radiations, magnetic fields, current-voltage signals, and combinations thereof" (emphasis added). In other words, claim 84 calls for the cells to generate all of the recited forms of energy, either concurrently or sequentially, as well as combinations thereof. Each of Browner's electrical contacts is supplied with current from current source 30, which is a generator of intermittent or oscillating, muscle-contracting electrical current and potential and thus generate, concurrently or sequentially, current-voltage signals, electromagnetic radiations and magnetic fields, but do not also generate radio frequencies, as also called for in claim 84.

The rejection of claim 87, as being anticipated by Browner is sustained. Browner discloses an apparatus for treating wounded tissues with electrotherapy comprising a fabric 12, plural electrical contacts 1-10 mounted on the fabric, either directly or via elements 17, a current source 30, which is a generator of intermittent or oscillating, muscle-contracting electrical current and potential, and adjusting knobs 31 and potentiometers 32 connected between the current source 30 and the contacts for controlling current applied to the tissues by the contacts.

The rejection of claim 89 as being anticipated by Browner is also sustained. Appellant's argument that the feature of controlled field intensities is not shown by Browner (brief, page 30) is unsound. As discussed above, the current source 30

supplies current, which is controlled by means of potentiometers 32, to apply controlled field intensities from each of the contacts. As appellant has not separately argued claims 90-101 with any reasonable specificity, electing merely to point out the limitations therein, the rejection of these claims as being anticipated by Browner is also sustained.

With respect to claim 102, appellant argues, on page 33 of the brief, that Browner is not a healing apparatus as claimed and does not show controls connected to the cells separately controlling application of power to each of the cells individually. These arguments are not well taken, for the reasons discussed above. The rejection of claim 102, as well as claims 103-105 which appellant has not argued separately with any reasonable specificity, electing merely to recite the limitations therein, as being anticipated by Browner, is sustained.

Rejection (8)

With regard to claim 1, appellant argues, on page 35 of the brief, that "Russek does not have a group of cells as in the Applicant's invention." This argument is belied by the express disclosure in Figure 12 and in column 6, line 5 *et seq.* of a miniaturized TENS device formed in a flat-pack arrangement 70 having flexible fabric or fabric-like members 71, 72 and having electrode connector snaps 75 at positions I-VI for snap-connection to electrodes. The electrodes are preferably used in pairs. Switches 76,

77, 78 control energization of the pairs of electrode snap connectors 75 so that the appropriate body portions are applied with electrical signals from the TENS device. An amplitude and on/off control knob is provided for one channel of the TENS device. The device 70 may be energized by internally contained batteries or may be connected to an external battery pack carried by the patient or connected to the device by wires.

Appellant's argument on page 35 of the brief that Russek also does not have a group of cells "connected to self-contained controls within each cell and individually communicating with each of the plurality of cells" and appellant's arguments on page 36 of the brief also are not persuasive as they are not commensurate in scope with claim 1, which does not require self-contained controls within each cell and individually communicating with each cell or the particular amplitude and frequency and multiple field treatment features discussed on page 36 of the brief. Limitations not appearing in the claims cannot be relied upon for patentability. Self, 671 F.2d at 1348, 213 USPQ at 5 (CCPA 1982).

In light of the above, the rejection of claim 1 as being anticipated by Russek is sustained. Appellant has not separately argued the like rejection of dependent claims 3-6, 16, 22-25, 27-34, 36, 38 and 39 with any reasonable specificity⁵, thereby allowing

⁵ Statements which merely point out the limitations of the claims will not be considered separate arguments for patentability of those claims.

them to stand or fall with claim 1. It follows that the rejection of these claims as being anticipated by Russek is also sustained.

With respect to claim 2, Russek's flexible fabric or fabric-like members 71, 72 respond to the recited thin, flexible and portable base. The rejection of claim 2 as being anticipated by Russek is sustained.

As discussed above, claim 84 requires that the cells concurrently or sequentially generate radio frequencies, electromagnetic radiations, magnetic fields, current-voltage signals, and combinations thereof. While we find disclosure in Russek of electrodes generating current-voltage signals, and hence electromagnetic radiations and magnetic fields, we find no disclosure of cells generating radio frequencies, as also called for in the claim. The rejection of claim 84 as being anticipated by Russek is not sustained.

The rejection of claim 87 as being anticipated by Russek is sustained. With respect to claim 87, appellant's arguments on page 42 of the brief that Russek lacks a flexible base and plural individually controlled application cells are not well taken, as these features are clearly disclosed, as discussed above, in the Figure 12 embodiment of Russek. The remainder of appellant's arguments on page 42 of the brief are also unpersuasive as they are not directed to features actually recited in claim 87.

The rejection of claim 88, as well as claims 89-101 which appellant has not separately argued with any reasonable specificity⁶, as being anticipated by Russek is sustained. As aptly pointed out by the examiner on page 11 of the answer, Russek discloses plural energy generators at column 6, lines 28-31, in the form of internally contained flat-pack type batteries.

Appellant's arguments (brief, pages 46-47) with respect to claim 102 are unpersuasive for the reasons discussed above with regard to claims 1 and 87. Accordingly, the rejection of claim 102, as well as claims 103-105 which appellant has not separately argued with any reasonable specificity, choosing merely to point out the claim limitations, as being anticipated by Russek is also sustained.

REMAND TO THE EXAMINER

This application is remanded to the examiner, pursuant to 37 CFR § 41.50(a)(1), for consideration as to whether a rejection of claims 1-7, and any of the claims depending therefrom, are anticipated by McLeod. With particular regard to claim 7, although, as discussed above, we found no suggestion in the teachings of Ostrow and McLeod to modify Ostrow to provide self-contained controls in each panel 28 of Ostrow's applicator wrap 22, instead of providing such controls in the console 24, it is

⁶ As repeatedly pointed out above, a statement merely pointing out the claim limitations will not be considered a separate argument for patentability of the claim.

not immediately apparent to us why the subject matter of claim 7 is not anticipated by McLeod. In particular, McLeod discloses a device for controlling tissue growth comprising a thin and flexible base in the form of straps or belts 134, 136 on which a plurality of cells (deformable treatment pads 130, 132) are arranged and a self-contained power source 148, magnetic field sensor (146 or 204) and microprocessor (162 or 200) enclosed within each treatment pad.

CONCLUSION

Rejections (2), (4) and (5) are sustained. Rejection (1) is sustained as to claims 1-4, 26, 39 and 87-105 and reversed as to claim 84. Rejection (3) is sustained as to claims 38 and 40 and reversed as to claims 7-15. Rejection (6) is reversed. Rejection (7) is sustained as to claims 1-3, 26, 32, 87 and 89-105 and reversed as to claim 84. Rejection (8) is sustained as to claims 1-6, 16, 22-25, 27-34, 36, 38, 39 and 87-105 and reversed as to claim 84.

In addition to affirming the examiner's rejection of one or more claims, this decision contains a remand. 37 CFR § 41.50(e) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office 21 (September 7, 2004)) provides that

[w]henever a decision of the Board includes a remand, that decision shall not be considered final for judicial review. When appropriate, upon conclusion of proceedings on remand before the examiner, the Board may

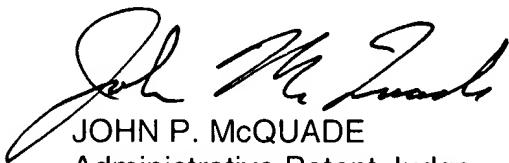
enter an order otherwise making its decision final for judicial review.

Regarding any affirmed rejection, 37 CFR § 41.52(a)(1) provides "[a]ppellant may file a single request for rehearing within two months from the date of the original decision of the Board."

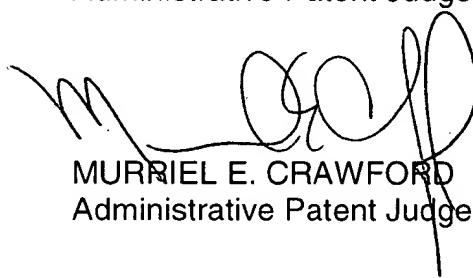
The effective date of the affirmance is deferred until conclusion of the proceedings before the examiner unless, as a mere incident to the limited proceedings, the affirmed rejection is overcome. If the proceedings before the examiner do not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejections, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal
may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART AND REMANDED



JOHN P. McQUADE
Administrative Patent Judge



MURRIEL E. CRAWFORD
Administrative Patent Judge



JENNIFER D. BAHR
Administrative Patent Judge

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